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Eroding “Checks” on Presidential Authority – Norms, the Civil Service, and the Courts

Peter L. Strauss¹

Susan Rose-Ackerman’s “Executive Rulemaking and Democratic Legitimacy: ‘Reform’ in the US and the UK’s Route to Brexit”² insightfully illuminates important differences between parliamentary and presidential systems of government in relation to executive bodies’ production of the large volume of secondary legislation common, indeed inevitable, for both. Agreeing heartily with her conclusion that the weakness of parliamentary engagement with secondary legislation, and limited judicial review of its production, counsels greater provision for public participation and transparency of action at the agency level, there is little for me to add. Aware, too, as she remarks, that others have dealt more extensively with pending legislative proposals to amend American rulemaking processes³ and with questionable tactics of the Trump administration in relation to existing regulations of which it disapproves,⁴ the comments on American issues that follow have more the nature of supplement than critique. Her account of the tensions and hopes for future developments on both sides of the Atlantic are entirely persuasive.

Social fears over immigration by the world’s refugees, legal and illegal, have fueled the growth of xenophobic populism in many countries, promoting a distinct turn to the right and to autocratic leadership in many countries. Brexit seems to have been associated with xenophobia, although its consequences so far have been contained within the UK’s political traditions. The Trump administration, put in office after a campaign dwelling on those fears, has been seen by many to mark those turns. To be sure, prior presidencies had steadily promoted increasing presidential authority over the functioning of American government. Yet President Trump’s administration has dramatically reflected these turns both in its claims of authority and in its further abandonment of political norms that had been in decline at least since the presidency of Bill Clinton. Professor Rose-Ackerman’s paper invites us to explore the differences between Prime Minister May’s and President Trump’s approaches to a central necessity of contemporary governance, executive agencies’ development of secondary legislation (Statutory Instruments [SIs] in the UK, regulations in the US), and their implications for democratic governance. Very recent developments in both countries should help to illuminate those differences. PM May’s government reached a Brexit agreement with the EU that as a compromise satisfied few and sparked political struggles that threatened but have not yet toppled her government. The mid-term American elections produced a sizable Democrat majority in the House of Representatives that promises aggressive oversight of President Trump, but also (in an era of heightened partisanship) continuous legislative stalemates such as

¹ Betts Professor of Law Emeritus, Columbia Law School. Convenor of this remarkable Symposium and enormously grateful to all its participants, I owe particular thanks to Professor Rose-Ackerman, who stepped in at a late moment when a main presenter had to withdraw to provide these thoughtful comparative observations – and when she necessarily left behind her previous undertaking to comment on the withdrawn contribution, that led to my presence here, also as a commenter. Fortunately, a book chapter in preparation for another volume on comparative administrative law, not hers, had led me to think about separation of powers in a comparative context, “Separation of Powers in Comparative Perspective: How Much Protection for the Rule of Law?”, see SSRN abstract number 3308207, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3308207, and the thinking underlying that essay animates these comments.

² Placeholder

³ Placeholder

⁴ Placeholder

encouraged his predecessors increasingly to attempt on their own initiatives one might have expected to be created by Congress. The Republican party kept control of the Senate, an outcome promising continued staffing of the judiciary with the conservative voices sponsored by the Federalist Society.

The pending Brexit document is a complex agreement of almost six hundred pages that has been preliminarily approved by both the UK cabinet and the EU Council, and awaits parliamentary approval in both places. The agreement, that the EU has signaled is an unnegotiable “best offer” on its part, illustrates the limitations of “parliamentary supremacy” as a characterization of UK government today, both in its terms and in its reception once announced. The wish to leave the EU appears to have been grounded, in good part, in the realization how significantly Parliament’s contemporary choices were being limited by what a colleague has called ‘The Brussels effect.’⁵ Simply walking away from the EU – exiting, that is, without a transitional agreement – might restore that supremacy (at least outside the framework of the European Convention on Human Rights, that would remain in effect), but at costs in economic, political and legal shock to the UK that most UK citizens find unacceptable. Yet the agreement entails continuing adherence to European standards and institutions in ways that will significantly constrain Parliament’s freedom of action. In the immediate wake of its announcement, several important ministers, hard-line supporters of Brexit, resigned from the UK cabinet, and PM May’s leadership appeared threatened by resistance from them and similarly minded back-benchers in her coalition. Although, after a few days of intense speculation and intrigue, a working cabinet remained in place, committed to the agreement, dissidence within the Conservative Party eventually reached the level that provoked a vote within her party whether to remove her from office. Although it failed, it seems most likely that, as Members contemplate the realities of the situation and the consequences of exiting without an agreement, Parliament will reject the agreement – raising the prospect of new parliamentary elections. Dissatisfied comments have been heard both from Members who want a cleaner break with Europe, and those who would prefer that the UK remain in the EU. PM May has insisted that the referendum results leading to Brexit must be respected, rejecting the call by some for a second referendum. (Nor is it at all clear the EU would accept the UK’s continued membership as if nothing had happened, should that have eventuated). The issue must be resolved by March 19, 2019, when Brexit will take effect, with or without an agreement in place. And PM May’s strenuous efforts to win concessions from the EU – particularly on avoiding the creation of a border-crossing customs barrier between Ireland and Northern Ireland – have proved unavailing. From the EU perspective the bargain already struck is the best the UK could hope for, with simple exit the only (and now likely) alternative. Readers of these comments will know how this eventuated.

Particularly noteworthy from the perspective of the comparison Professor Rose-Ackerman has undertaken are a number of considerations.

1. It strikingly illustrates the collective nature of British executive government. The complex understanding negotiated under Prime Minister May’s watch could not be sent to Parliament without the assent of the cabinet as a whole. Dissenting ministers could resign (not all did), and if they did their replacement could be effected immediately. That cabinet ministers have votes, which control what the (executive) government can

⁵ Anu Bradford, *The Brussels Effect: How the EU Shapes the World through Rules and Regulations* (forthcoming in 2019 with OUP).

- propose or do, both produces constraints of accountability and results in the agreement, *if* accepted by the cabinet, having substantial political force within Parliament.
2. It illustrated as well the possibility of Party discipline of the Prime Minister. After the requisite number of party Members (48) had filed statements that they had lost confidence in her leadership, a Party vote resulted that might have removed her from office and, failing that, left her as well as the prospects of an agreed Brexit greatly weakened.
 3. Such an important issue is capable of catalyzing an immediate change of government. Should Parliament finally reject the proposal, the anticipated result, there may be immediate new elections, perhaps entailing a complete change of government. And for an issue of this importance, as Professor Rose-Ackerman remarks, the practice of “whipping,” by which parliamentary back-benchers are encouraged by the prospect of discipline to adhere to a Party line, will not be employed.
 4. As important from the perspective of this comparison, is that this all appears to be occurring within the ambit of ordinary politics. While the UK’s population has been sharply divided in its attitude to the EU, the buildup to Brexit has not imperiled UK political life, threatened the rise of an autocracy, or signaled a departure from the long-accepted norms of political behavior there. Consideration of the agreement within the UK cabinet has underscored both the collective nature of decision there, and the freedom with which its political leadership can be challenged on central issues. “Accountability” is the central pillar of its parliamentary government.⁶
 5. However difficult accommodating to Brexit may be, legislation and the development of statutory instruments will remain in the unified control of the prime minister and her cabinet. That cabinet and a very thin layer of other political officials, responsible to Parliament, lie atop a civil service of over 400,000 actually responsible for law-execution, including the development of SIs. In formal terms, SIs are the work-product of ministers and, as Professor Rose-Ackerman remarks, are subject to parliamentary approval. The reality is that the level of technical detail they entail compromises the reality even of ministerial control. The 585-page Brexit agreement, similarly, resolves countless difficult issues; ascribing cabinet or, especially should it be forthcoming, parliamentary approval to individual particulars would be unrealistic. In consequence, as she argues, early public participation in the development of SIs is a practical necessity for enhancing the reality of their democratic legitimacy.

The American situation presents striking contrasts. Collective responsibility for executive action, either within the ‘cabinet’ or to the Congress does not exist. Subject to two marginal exceptions,⁷ neither the cabinet nor the President’s party nor the Congress can effect a change in the presidency outside the fixed election cycle. Although presidential elections may reflect voters’ reaction to administration issues, they are never prompted, immediately, by a governmental failure to get legislative approval for the adoption of a particular desired course of action (creating a kind

⁶ Peter Cane, *Controlling Administrative Power -- An Historical Comparison* (Cambridge U.P. 2016).

⁷ The 25th Amendment to the Constitution provides a means for cabinet displacement of the presidency to the Vice President; given the President’s political controls over cabinet members and their tenure, it is, realistically, limited to cases of physical or mental disability. Although the framers of the Constitution gave considerable attention to the constitutional provisions for removing officers by impeachment, [Madison’s Notes will be a source, if one is thought important] no President has ever been impeached. Three have been significantly threatened by impeachment proceedings, and many have urged the impeachment of President Trump now that the House, responsible for articles of impeachment, is in Democrat control; it seems most unlikely to occur.

of referendum on that action). Donald Trump neither had to secure cabinet approval for the acts Professor Rose-Ackerman reports, nor faced loss of his government in the mid-Term elections which have just occurred. What he lost was his party's control of one house of Congress; the executive branch over which he presides was untouched (and his party's retention of control in the Senate essentially preserved his capacity to staff its upper levels and the judiciary as he pleases).

In the wake of these recent election results, one can anticipate that the coming years will only heighten those contrasts. Facing a somewhat dysfunctional legislature unlikely to adopt much legislation might he wish to commend to it, President Trump might be led, as his predecessors have been, to aggressive claims of authority to do on his own what he cannot get done legislatively. At this writing, elements of the government remain have been shut down over a dispute between the President and the Congress over the funding he desires for further construction of a wall on the Mexican border. He has threatened to proclaim this as a national emergency permitting the use of Department of Defense resources to accomplish his end -- legally, a highly dubious move,⁸ but also a reflection of a trend in presidential behaviors in response to congressional inaction that did not begin when he took office.⁹ As Justice Jackson trenchantly remarked in *Youngstown Sheet & Tube v. Sawyer*,

"... I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems. A crisis that challenges the President equally, or perhaps primarily, challenges Congress. If not good law, there was worldly wisdom in the maxim attributed to Napoleon that "The tools belong to the man who can use them." We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers."¹⁰

Although subject to committee oversight and to possible judicial review, the APA rulemakings Professor Rose-Ackerman evokes, unlike SI's, lack even a facial requirement of congressional approval. Whether in the service of deregulation or (as in the immigration context) regulation, they are strictly executive actions. And when effected by Executive Order or administrative guidance, they are essentially immune from judicial review.

Hopes that the civil service might action as an internal check on the hollowing out of the regulatory state she describes are undercut by both its politicization and, perhaps more important, its displacement. While the American federal civil service numbers about five times that of the UK -- like the UK, about one civil servant for each 160 citizens -- the political layer atop it is much thicker and, indeed, developments since Congress's 1978 enactment of the civil service reforms creating the Senior Executive Service have led to significant politicization of civil service elements one might have assumed were staffed on the basis of expertise and commitment to a lifetime of public service outside politics.¹¹ As she reports, a significant winnowing of the civil service has been occurring, through both resignations of persons unable to reconcile what they are being asked

⁸ See, e.g., Bruce Ackerman, "No, Trump Cannot Declare an 'Emergency' to Build His Wall," available at <https://www.nytimes.com/2019/01/05/opinion/no-trump-cannot-declare-an-emergency-to-build-his-wall.html>.

⁹ See, e.g. *Texas v. Department of Homeland Security*, 809 F. 3d 134 (5th Cir. 2015) aff'd by an equally divided court, 136 S.Ct. 2271 (2016) (Obama administration policy, at his direction, respecting treatment of some illegal immigrants).

¹⁰ 343 U.S. 579, 654 (1952).

¹¹ David Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency*, 76 Geo. Wash. L. Rev. 1095 (2008).

to accomplish with their scientific or other expert understandings, and through use of the SES powers of discipline and reassignment. The winnowing is a phenomenon also encountered in the Reagan administration, when Ann Gorsuch controlled the Environmental Protection Administration and James Watt the Department of Interior; politicization is more recent, and perhaps less readily overcome.

Beyond this, both the “presidential administration” many have celebrated since now Justice Elena Kagan wrote about it on returning to academia from the Clinton White House¹² and the coming of the digital age have effectively moved rulemaking decision from the agencies to which Congress assigned that responsibility to the White House. Important rulemakings generate large volumes of information and, in the paper age, agencies had a virtual monopoly of that information. “Information is power.” Today, the information that they would uniquely have possessed and controlled is shared with the White House on the government’s “cloud,” further enhancing White House control. The public, significantly-transparent rulemaking procedure Congress required of administrative agencies and Professor Rose-Ackerman properly celebrates has to a significant degree been replaced by a covert¹³ White House process. The presidential self-aggrandizement arguably thus reflected has not been tested in the Supreme Court and perhaps cannot be. Recent Supreme Court appointees, both Democrat (Kagan) and Republican (Kavanaugh), have been friendly to executive power claims, and given the President’s selection of them at a time of expressed concerns about expansive claims of executive authority, this perhaps is not surprising.

One contemporary contrast between the two systems lies outside issues of political or legal structure, yet has great significance for the manner in which their governments function. This is the observance of “norms” of political behavior that have developed over time, and on which social stability may significantly rest.¹⁴ In the UK, the Brexit issue appears to be proceeding towards resolution, one way or another, under normal politics. In the United States, long before Donald Trump was elected – at least since the ascendancy of Newt Gingrich, and some would push the date back as far as Reagan or Nixon – what had been normal politics often permitting bipartisan congressional action has been degenerating into partisanship at a level producing books like Thomas Mann and Norman Orenstein’s *The Broken Branch: How Congress Is Failing America and How to Get It Back on Track* (2006). President Trump’s twitter-storms and other actions, such as the two-for-one executive order Professor Rose-Ackerman discusses, have in the eyes of many accelerated this degeneration. In the particular context of Brexit, just as the debates over the Brexit document PM May had negotiated heated up, President Trump remarked on camera that what seemed a good deal for the EU could deny the UK the right to make separate trade deals with the United States – just a further instance of disregard for the interests of allies, that produced British headlines like “Trump’s Brexit bomb is a brutal reminder that May’s work has barely started”¹⁵

¹² Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245 (2001).

¹³ Promises of transparency contained in Executive Order 12866, the central means of White House engagement with agency rulemaking, have not been kept. E.g., Nina Mendelson, *Disclosing “Political” Oversight of Agency Decision Making*, 108 Mich. L. Rev. 1127 (2010).

¹⁴ See Josh Chafetz and David Pozen, *How Constitutional Norms Break Down*, 65 UCLA L. Rev. 1430 (2018).

¹⁵ Gaby Hinsliff in *The Guardian*, Nov. 27, 2018, available at <https://www.theguardian.com/commentis-free/2018/nov/27/trump-brexit-bomb-trade-deals-theresa-may> “His words are still a brutal reminder that, in the unlikely event May’s deal limps through parliament, the hard work of building viable trading relationships outside the EU will still only just be beginningAll Trump has really done,” Hinsliff concludes, “is remind everyone of that painful reality. So much for the idea of taking back control, or reclaiming sovereignty from Brussels, if all we end up doing is surrendering it to Washington or Beijing.”

In the wake of President Trump's inauguration have come books like Steven Levitsky and Daniel Ziblatt, *How Democracies Die* (2018) and Tom Ginsburg and Aziz Huq, *How to Save a Constitutional Democracy* (2018). Both address what seems a general turn to the right and to autocratic leadership in many countries – Austria, Venezuela, Hungary, Turkey, Japan; both see the American threat not as cataclysmic change but as erosion, to which the President's behaviors have been contributing but hardly as the sole cause. Levitsky and Ziblatt persuasively suggest that the prior period of political mutual respect among Democrats and Republicans (like that in the United States during the Monroe administration) essentially rested on the legal subordination of African-Americans. Its unraveling may have begun with the desegregation movement, the forced resignation of President Nixon and the defeat of President Reagan's nomination of Robert Bork to the Supreme Court. It became evident with the political rise of Newt Gingrich late in the 20th Century. The unprecedented Republican refusal even to consider President Obama's nomination of Merrick Garland to the Supreme Court, and the election and subsequent norm-shattering behaviors of President Trump, his racist remarks perhaps especially, mark the progression of the disease, not its onset.

American politicians now treat their rivals as enemies, intimidate the free press, and threaten to reject the results of elections. They try to weaken the institutional buffers of our democracy, including the courts, intelligence services, and ethics offices. ... This is how elected autocrats subvert democracy—packing and “weaponizing” the courts and other neutral agencies, buying off the media and the private sector (or bullying them into silence), and rewriting the rules of politics to tilt the playing field against opponents. The tragic paradox of the electoral route to authoritarianism is that democracy's assassins use the very institutions of democracy—gradually, subtly, and even legally—to kill it.¹⁶

And if there is to be a cure, both books argue, it will come not from the law, but from the realization, by politicians and voters alike, that moderation must be chosen, the possibilities of bipartisanship in Congress restored.

Which brings me, finally, to what is, in my judgment, another important and unfortunate contrast between the United States and the UK – the absence of checks against the politicization of the judiciary. Professor Rose-Ackerman celebrates the slowness of the replacement process as a safeguard; I am not so sure. Judicial independence has long been a central value in UK politics, even when appointments were government-made. Since the Constitutional Reform Act of 2005, itself a response to the European Convention on Human Rights, recommendations for judicial appointments have been the responsibility of a Judicial Appointments Commission or, in the case of vacancies on the Supreme Court created to replace the House of Lords, an ad hoc selection commission. Both are impartial bodies outside the government. Although a cabinet member, the Lord Chancellor, can disapprove these recommendations, he would pay a political cost in doing so. European constitutional courts, generally, have appointment constraints and traditions that emphasize professional experience and apolitical selection

Who judges are has profound implications for judicial capacity to constrain autocracies, and the United States lacks institutions, common elsewhere, capable of subduing the politicization of judicial appointments. Supreme Court appointments, especially, are politically influenced, and the American judiciary is not the neutral controller the Constitution's framers seem to have imagined.

¹⁶ Steven Levitsky and Daniel Ziblatt, *How Democracies Die* 1, 7 (2018)

With decisions open to influence by policy as well as strictly legal considerations, Presidents understandably nominate judges friendly to their views, including their views of executive authority. The American Constitution provides safeguards of independence – once appointed, federal judges enjoy life tenure (absent the remote possibility of impeachment) and irreducible compensation levels. Yet the prospect of life tenure can arm as well as disarm judicial politicization, and the appointment of young judges and Justices, carrying their views long into the future, is an irresistible lure for the President who shares them.

In recent memory, the Senate and President have abandoned numerous checks against excessively partisan judicial appointments. The Federalist Society, not the ABA is now seriously consulted; the “blue slip” process that essentially gave home state senators control over district court appointments, and in some states produced informal screening processes, has been repudiated; elimination of the filibuster from the Senate rules – itself the product of extreme partisanship’s emergence – eliminated another vector for moderation when one party controls both the Senate and the presidency. The earlier appointments Professor Rose-Ackerman celebrates, a New York Times graphic recently suggested, had produced a two-peaked distribution of judicial politics, with its valley precisely where one would want the peak of a normal distribution to be, at moderation.

And President Trump has been emphatic that movement of that distribution to the right is his aim. He recently ascribed a judicial decision rejecting one of his administration’s actions to an “Obama judges.” Chief Justice Roberts promptly issued a highly unusual rebuke: “We do not have Obama judges or Trump judges, Bush judges or Clinton judges. ...An independent judiciary is something we should all be thankful for.” The President’s tweeted response? “Sorry Chief Justice John Roberts, but you do indeed have ‘Obama judges.’” One result was a New York Times OpEd, “The Two-Emperor Problem.”¹⁷ Note that Congress is missing; Trump and Roberts are the two emperors. And the column’s conclusion echoes, in its way, the concerns of Leditsky and Ziblatt, Ginsburg and Huq:

A dual imperialism is still a separation of power, and a decaying republic with two emperors by definition does not have its Caesar or Augustus yet. Nor are we about to get one: Because Trump is too politically weak to win a stark confrontation with the Supreme Court, and Roberts is temperamentally modest and consensus-oriented, their Twitter beef is an illumination of reality, rather than a step into crisis. So there is time for an anti-imperial rebalancing, in which a more assertive Congress somehow brings us back into constitutional equilibrium.

But if Congress prefers abdication, a two-emperor system isn’t built to last. Come a crisis, one (probably the one that commands the military and law enforcement) must be master, the other must submit. That’s the important message of Trump v. Roberts. Let those with ears, hear.

Recall again the warning of Justice Jackson in *Youngstown Steel*. I should prefer Professor Rose-Ackerman’s prognosis; but see in the increasing age of the present federal judiciary and the youth of nominated replacements some reason to believe the President will be able to succeed in his aim.

¹⁷ Ross Douhat. The New York Times Nov. 25, 2018, SR11, available at <https://www.nytimes.com/2018/11/24/opinion/sunday/john-roberts-donald-trump.html>.

Levitsky and Ziblatt celebrate the defeat of President Roosevelt's Court-packing plan as a signal example of the kind of norm-enforcement that must occur if our drift towards autocracy is to be checked. Neither Congress nor American voters have yet been persuaded that protecting the character of the American judiciary today is an important value to be pursued.